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**HUSLI MOK**

**v.**

**JUNDAR REALTY DEVELOPMENT SDN BHD & ANOR**

B

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
ABDUL WAHAB PATAIL JCA
BALIA YUSOF WAHI JCA
[CIVIL APPEAL NO: Q-02-251-2010]

C

5 FEBRUARY 2014

***CIVIL PROCEDURE:*** *Originating summons - Whether appropriate - Serious allegations and disputes as to facts of case - Whether action erroneously filed by way of summons - Whether originating summons*

D

*action should have been converted to writ action - Whether matter should be remitted to High Court to be heard de novo as writ action - Rules of the High Court 1980, O. 28 r. 8(1)*

***CIVIL PROCEDURE:*** *Action - Proceedings - Application to convert originating summons action to writ action - Serious allegations and*

E

*disputes as to facts of case - Whether action erroneously filed by way of summons - Whether matter should be remitted to High Court to be heard de novo as writ action - Rules of the High Court 1980, O. 28 r. 8(1)*

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The appellant, as the administrator of the estate of one Utet, commenced an originating summons action against the first respondent for breach of agreement ('the first originating summons action'). The first respondent offered the appellant RM400,000 for the withdrawal of the first originating summons action and to settle the matter amicably. The appellant thus executed a deed of

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settlement with the first respondent. It was alleged by the appellant that it was not explained to him that the deed of settlement contained a term that the appellant was to transfer lands ('the said lands') to the first respondent. The appellant further alleged that he subsequently discovered that one of

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the said lands had been fraudulently transferred to the first defendant. Hence, the appellant filed another originating summons ('the second originating summons action') to recover the said land from the first respondent. At the proceedings of the originating summons, in view of the serious allegations and disputes as to the

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facts, as revealed by the affidavits of both sides, it was inappropriate

that the proceedings be disposed of solely on affidavit evidence (O. 5 r. 4(2)(b) of the Rules of the High Court 1980). The appellant, who had erroneously filed the action by way of originating summons, at the hearing of the originating summons, orally applied for the matter to be converted to a writ action. The High Court Judge, however, turned down the appellant's oral application and ordered the hearing to proceed forthwith as an originating summons action. Having considered the submissions, the High Court Judge found that there was no fraud or fraudulent misrepresentation established by the appellant and dismissed the second originating summons. Hence, the appellant appealed.

**Held (allowing appeal with costs in the cause)**
**Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:**

**(1)** The High Court Judge had erred in law in not allowing the appellant's oral application. In light of the conflicts in the evidence, the High Court Judge should have acceded to the appellant's oral application and converted the originating summons action to a writ action and proceeded with the matter in the manner as prescribed by O. 28 r. 8(1) of the Rules of the High Court 1980: to order that the affidavits be deemed to be pleadings, with liberty to any party to apply for particulars; or alternatively, to issue directions to the parties to file their respective pleadings (statement of claim, statement of defence, etc). (paras 6 & 22)

**(2)** Having examined the affidavits, this court disagreed with the finding of the High Court Judge that the appellant's affidavits did not disclose any particulars of fraudulent misrepresentation or fraud. The matter would have to be adjourned for the trial to be held, for witnesses to testify and be cross-examined. Thus, the matter should be remitted to the High Court to be heard *de novo* as a writ action before another judge. (para 25)

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu, sebagai pentadbir harta pusaka seorang yang bernama Utet, telah memulakan tindakan saman pemula terhadap responden pertama untuk pelanggaran perjanjian ('tindakan saman pemula pertama'). Responden pertama telah memberikan RM400,000 kepada perayu untuk menarik balik tindakan saman pemula pertama

dan untuk menyelesaikan perkara tersebut secara damai. Perayu telah melaksanakan satu surat ikatan penyelesaian dengan responden pertama. Adalah hujahan perayu bahawa ia tidak diperjelaskan kepadanya bahawa surat ikatan penyelesaian tersebut mengandungi syarat bahawa perayu harus memindah milik beberapa tanah ('tanah tersebut') kepada responden pertama. Perayu juga menghujahkan bahawa dia telah mendapat tahu bahawa salah satu tanah tersebut telah dengan secara tipu dipindah milik kepada defendan pertama. Oleh itu, perayu memfailkan satu lagi saman pemula ('tindakan saman pemula kedua') untuk mendapatkan semula tanah tersebut daripada responden pertama. Semasa prosiding saman pemula, memandangkan terdapat tuduhan dan pertikaian yang serius, seperti yang didedahkan oleh afidavit kedua-dua pihak, adalah tidak sesuai untuk prosiding dilupuskan hanya melalui keterangan afidavit (A. 5 k. 4(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980). Perayu, yang telah secara salah memfailkan tindakan melalui saman pemula, telah pada perbicaraan saman pemula memohon secara lisan supaya perkara itu ditukar kepada tindakan writ. Hakim Mahkamah Tinggi, walau bagaimanapun, telah menolak permohonan lisan perayu dan memerintahkan supaya perbicaraan diteruskan dengan tindakan saman pemula. Setelah mempertimbangkan penghujahan, Hakim Mahkamah Tinggi telah mendapati bahawa tiada penipuan atau misrepresentasi palsu dibuktikan oleh perayu dan telah menolak saman pemula kedua. Oleh itu, perayu merayu.

**Diputuskan (membenarkan rayuan dengan kos dalam kausa) Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:**

**(1)** Hakim Mahkamah Tinggi telah khilaf dari segi undang-undang apabila tidak membenarkan permohonan lisan perayu. Memandangkan terdapat percanggahan keterangan, Hakim Mahkamah Tinggi harus mempersetujui permohonan lisan perayu dan menukarkan tindakan saman pemula kepada tindakan writ dan meneruskan prosiding perkara itu dengan cara yang ditetapkan oleh A. 28 k. 8(1) Kaedah-Kaedah Mahkamah Tinggi 1980: untuk memerintahkan afidavit dianggap pliding, dengan kebebasan kepada mana-mana pihak untuk memohon butiran; atau secara alternatif, untuk mengeluarkan arahan kepada pihak-pihak supaya memfailkan pliding masing-masing (penyataan tuntutan, penyataan pembelaan, dan lain-lain).

**(2)** Setelah mengkaji semula afidavit-afidavit yang telah dikemukakan, mahkamah tidak bersetuju dengan dapatan Hakim Mahkamah Tinggi bahawa afidavit perayu tidak mendedahkan apa-apa butiran berkenaan misrepresentasi palsu atau penipuan. Perkara sepatutnya ditangguhkan supaya perbicaraan boleh diadakan, untuk saksi-saksi memberi keterangan dan diperiksa balas. Oleh itu, perkara harus diremitkan kepada Mahkamah Tinggi untuk dibicarakan *de novo* sebagai writ di hadapan hakim yang lain.

**Case(s) referred to:**
*Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 3 CLJ 1685; [1992] CLJ (Rep) 331 SC* ***(refd)***

**Legislation referred to:**
Rules of the High Court 1980, O. 5 r. 4(2)(b), O. 28 r. 8(1)

*For the appellant - Bong Ah Loi; M/s Suhaili Bong*
*For the respondents - Rajesh Jethi; M/s Jethi & Assocs*
*For the Director-General of Insolvency - Zalina Yacob*

*[Appeal from High Court, Miri; Originating Summons No: 24-129-2010]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Hishamudin Mohd Yunus JCA:**

**[1]** This appeal is against the decision of the High Court of Sabah and Sarawak, at Miri, of 1 December 2009. The High Court had dismissed the appellant's/plaintiff's originating summons action against the respondents/defendants.

**[2]** On 17 June 2013 we, unanimously, allowed the appeal (with costs in the cause).

**[3]** At the outset of the hearing of this appeal the parties informed the court that there are three other related appeals, namely:

(a) Q-02-2986-2010;

(b) Q-02-2153-2010; and

(c) Q-02-2154-2010.

**[4]** The parties agreed that the decision of this court on Civil Appeal No: Q-02-251-2010, that is to say, the present appeal, would bind these three appeals.

**[5]** We shall now give our grounds.

**[6]** We allowed the appeal - but only on one ground: that the learned High Court Judge, with respect, had erred in law in not allowing the appellant's/plaintiff's oral application, at the commencement of the hearing at the High Court of the originating summons action against the respondents/defendants, that, in the light of the fact that there are serious disputes as to material facts, the matter ought to have been proceeded with as a writ action, and not by way of an originating summons.

**[7]** The prayers in the appellant's/plaintiff's originating summons are for:

(a) A declaration that an agreement dated 9 August 1988 made between one Utet Binti Telajan (since deceased) and the first respondent/first defendant, to develop two parcels of land (one of which is Lot 1092) in the District of Miri, be rescinded.

(b) A declaration that a deed of settlement dated 4 August 2003 made between the first respondent/first defendant and the appellant/plaintiff (together with a deed of variation dated 24 August 2004 to vary the deed of settlement) be declared null and void.

**[8]** The deceased, Utet, was the registered proprietor of two parcels of land (one of which is Lot 1092) ('the said lands') in the District of Miri. By an agreement dated 9 August 1988, made between the deceased and the first respondent/first defendant, the deceased appointed the first respondent/first defendant to develop the said lands into a housing estate. In consideration of the appointment, the first respondent/first defendant agreed to construct six units of semi-detached house on the said lands for the deceased. However, the first respondent/first defendant failed to develop the said lands. In fact, the first respondent/first defendant did not even commence any work on the said lands.

**[9]** The deceased died intestate on 4 July 1989. The appellant/plaintiff, Husly, is the administrator of the estate of Utet.

**[10]** The appellant/plaintiff, as administrator of the estate of Utet, commenced an originating summons action, namely, originating summons No: 24-207-99(MR), against the first respondent/first defendant for breach of the agreement ('the first originating summons action'). A

**[11]** It is, however, alleged by the appellant/plaintiff that, subsequent to the commencement of this first originating summons action, there was a representation made by the first respondent/first defendant to the appellant/plaintiff through the first respondent's/first defendant's solicitors, namely, M/s Kadir Wong Lin & Co, to the effect that the first respondent/first defendant offered the appellant/plaintiff RM400,000 for the withdrawal of the first originating summons action and to settle the matter amicably, and that the appellant/plaintiff was to execute a deed of settlement with the first respondent/first defendant. The deed of settlement was prepared by the first respondent's/first defendant's solicitors, M/s Kadir Wong Lin & Co. The appellant/plaintiff, being an uneducated man, accepted the offer and executed the deed of settlement (and thereafter the agreement to vary the deed of settlement) under the belief that the deed only concerned the withdrawal of the first originating summons action and the payment of RM400,000. It is also alleged by the appellant/plaintiff that it was not explained to him either by the first respondent/first defendant or by the first respondent's/first defendant's solicitors (M/s Kadir Wong Lin & Co) that the deed of settlement contains a term that the plaintiff was to transfer the said lands to the first respondent/first defendant. Had he known that the deed contains such a term he would not have signed the same. B C D E F

**[12]** Further, it is alleged that although it was never provided for in the deed of settlement, the first respondent/first defendant and M/s Kadir Wong Lin & Co had secured the appellant/plaintiff to sign a power of attorney purportedly appointing the first defendant as his attorney in respect of the said lands. Subsequently, the first respondent/first defendant, without the knowledge of the appellant/plaintiff, executed a deed of substitution of power of attorney affecting the said lands to substitute the second respondent/second defendant, namely, Premier Sigma Sdn Bhd as attorney to the appellant/plaintiff in place of the first respondent/first defendant. G H I

**[13]** The appellant/plaintiff further alleges that he subsequently discovered that one of the said lands, namely, Lot 1092, had been fraudulently transferred to the first respondent/first defendant. Hence, the appellant/plaintiff filed another originating summons action ('the second originating summons action') to recover the said land from the first respondent/first defendant.

**[14]** The decision under this second originating summons action is the subject matter of the present appeal.

**[15]** For the purpose of the second originating summons action, the appellant/plaintiff filed nine affidavits, whilst the respondents/defendants filed seven affidavits. All are contentious affidavits. The appellant/plaintiff, in his affidavits, makes allegations of fraud and fraudulent misrepresentation against the respondents/defendants, which allegations are denied by the latter.

**[16]** In our judgment, it should have been obvious to all parties (including the learned High Court Judge) at the proceedings of the originating summons that, in view of the serious allegations and disputes as to facts, as revealed by the affidavits of both sides, that it was inappropriate that the proceedings be disposed off solely on affidavit evidence. Order 5 r. 4(2)(b) of the Rules of the High Court 1980 provides:

> **4. Proceedings which may be begun by writ or originating summons (O. 5 r. 4)**
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> (2) Proceedings:
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> (a) ...
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> (b) in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons ...

**[17]** Thus O. 5 r. 4(2)(b) implies that if there is likely to be a substantial dispute as to fact, then it is inappropriate to commence an action by originating summons; instead, it must be begun by a writ action.

**[18]** Be that as it may, the respondents/defendants did not apply to the court for the originating summons to be converted to a writ action. Instead, they insisted at the hearing of the second originating summons action that the hearing be proceeded with as an originating summons action and based on the affidavit evidence;

notwithstanding the fact that the affidavits disclosed several contentious issues as to facts and that the issues could not be appropriately disposed off by way of affidavit evidence only.

**[19]** On the other hand, the appellant/plaintiff, the party who had erroneously filed the action by way of an originating summons, did, at the hearing of the originating summons, orally applied through his counsel, for the matter to be converted to a writ action.

**[20]** The learned High Court Judge, however, turned down the appellant's/plaintiff's oral application and ordered the hearing to proceed forthwith as an originating summons action and called for submissions based on the affidavit evidence. In his grounds of judgment, the learned judge said:

> As to the Plaintiff's counsel application to convert this OS to writ, I found there is no specific prayer to invoke Order 28 Rules of the High Court. The particulars depended by the Plaintiff are fraud and fraudulent misrepresentation which has not been specifically pleaded as required under Order 28. I am guided by the decision in the Supreme Court case of *Ting Ling Kiew & Anor v. Tan Eng Iron Workers Co. Ltd* [1992] 2 MLJ 217 which stated *inter alia* [at p. 227]:
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> > In such a case as the present where fraud or intention to defraud is the central issue we agree that the particulars of fraud must be specifically pleaded and it is obvious that the particulars of fraud are absent in the affidavit of the manager of the respondent company. On this point we find strong support in the case of *Walingford v. Mutual Society* [1880] 5 AC 685, particularly in the speeches of Lord Selborne [who] said [at p. 697]:
> >
> > > With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material of fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent ...

**[21]** Having considered the submissions, the learned High Court Judge dismissed the second originating summons action based on the merit of the application, based on the affidavit evidence. The learned High Court Judge, relying on the affidavits, made findings of mixed law and facts that there are no fraud or fraudulent misrepresentation being established by the appellant/plaintiff.

**[22]** In our judgment, it is here that the learned High Court Judge, with respect, erred. In the light of the conflicts in the evidence, he should have acceded to the appellant's/plaintiff's oral application and converted the originating summons action to a writ action and proceeded with the matter in the manner as prescribed by O. 28 r. 8(1) of the Rules of the High Court 1980: to order that the affidavits be deemed to be pleadings, with liberty to any party to apply for particulars; or, alternatively, to issue directions to the parties to file their respective pleadings (statement of claim, statement of defence, etc.). Order 28 r. 8(1) provides:

> **8. Continuation of proceedings as if cause or matter begun by writ (O. 28 r. 8)**
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> (1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

**[23]** In *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* [1992] 3 CLJ 1685; [1992] CLJ (Rep) 331, Jemuri Serjan CJ (Borneo) said (at p. 339):

> Unquestionably, these conflicts in the evidence can only properly and satisfactorily resolved if oral evidence is adduced and witnesses cross-examined on their evidence which, however, is not possible in proceedings begun by originating summons.

**[24]** With respect, having examined the affidavits, we disagree with the finding of the learned High Court Judge that the appellant's/plaintiff's affidavits do not disclose any particulars of fraudulent misrepresentation or fraud.

**[25]** It is likely then that the matter would have to be adjourned for the trial to be held; for witnesses to testify and to be cross-examined. But, for this adjournment, the High Court could have compensated the respondents/defendants with costs, since it was the appellant/plaintiff who started the problem by erroneously commencing the proceedings as an originating summons action.

**[26]** (We set aside the order of the High Court, and we directed that the matter be remitted to the High Court to be heard *de novo* as a writ action before another judge. We issued directions as to the filing and serving of pleadings.)

[Appeal allowed with costs in the cause.]